

BEFORE THE STATE BOARD OF EQUALIZATION  
OF THE STATE OF CALIFORNIA

In the Matter of the Appeals of  
JOSEPH PATRICK GILIO, VIRGINIA GILIO,  
THOMAS R. SULLIVAN AND MADELINE SULLIVAN

Appearances:

For Appellants: Dorothy E. Handy, Attorney at Law

For Respondent: John S. Warren, Associate Tax  
Counsel

O P I N I O N

These appeals are made pursuant to Section 18593 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protests of Joseph Patrick Gilio, Virginia Gilio, Thomas R. Sullivan and Madeline Sullivan to proposed assessments of additional personal income tax in the amounts of \$7,902.55 against Joseph Patrick Gilio, \$7,902.55 against Virginia Gilio and \$7,767.43 against Thomas R. and Madeline Sullivan for the year 1951.

Appellants Joseph Patrick and Virginia Gilio are husband and wife, as are Appellants Thomas R. and Madeline Sullivan. During the year 1951, Joseph Patrick Gilio and Thomas R. Sullivan were partners in a business known as Corbett's, which was operated in San Francisco. Mr. Gilio owned a two-thirds interest in the partnership and Mr. Sullivan owned a one-third interest. On the partnership return for the year in question the business was described as that of "commission brokers." The return showed "income" in the amount of \$724,847.00, "pay-outs" in the amount of \$695,902.50 and "gross profit" in the amount of \$28,944.75. "Operating costs" in the sum of \$6,745.94 were listed on the return but were not taken as deductions. The amount designated "gross profit" was reported by the Appellants on their own returns in proportion to their respective interests in the income from the business.

Corbett's quoted odds and handled bets on sporting events and, less frequently, on elections. The firm made some attempt to get equal amounts of bets on both of the contestants in a sporting event or election. However, it was rarely possible to balance the bets exactly, at least in the case of sporting events, and on some events the bets

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would be out of balance by a thousand dollars or more. Nearly all of the business of the firm was done by telephone. Patrons were generally granted credit, that is, they were not required to deposit the amount of the bet in cash before Corbett's would accept the bet. In some cases the bets were "laid off" with other bookmakers or "betting commissioners.?"

The firm's records were kept as follows: All bets were listed on daily sheets,- 'The totals from these daily sheets were given to the firm's accountant on his weekly calls at the office, after which the daily sheets were destroyed. The accountant made out and preserved monthly worksheets on fourteen-column accounting paper, The days of the month were listed in the first column, The other columns were headed by the words "play," "pay" and by various categories of operating expenses. 'The totals of the "play" and "pay" columns were the figures used for "income" and "payouts" on the partnership return,

The Franchise Tax Board determined that Section 17359 (now 17297) of the Revenue and Taxation Code was applicable and that the amount listed as ("pay-outs") on the partnership return was not deductible to the extent that it represented amounts paid out to customers after May 3, 1951, the effective date of Section 17357.

Section 17359 provided:

"In computing net income, no deductions shall be allowed to any taxpayer on any of his gross income derived from illegal activities as defined in Chapters 9, 10 or 10.5 of Title 9 of Part 1 of the Penal Code of California; nor shall any deductions be allowed to any taxpayer on any of his gross income derived from any other activities which tend to promote or to further, or are connected or associated with, such illegal activities."

Appellants do not deny that the operations of Corbett's constituted illegal activities of the type-referred to in the above-quoted section. They contend, however, that the income from the business was in the form of commissions in varying percentages of bets which were placed with Corbett's as-a stakeholder and that these commissions were properly reported on their individual returns.

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The determination of the Franchise Tax Board as to the amounts of income and deductions is prima facie correct and the burden of proving error is on the Appellants (Appeal of Herman E. Hetzel, decided May 11, 1955; Todd v. McColgan, 89 Cal. App. 2d 509; Commissioner, 111 Fed. 2d 374; Hodoh v. U. S., 153 Fed. Supp. 822; Anthony Delsanter, 28 T.C. -Leonard-B. Willits, 36 B.T.A. 294). Appellants have offered no testimony, records or evidence of any kind in support of their position. We have therefore found the facts to be as stated by the Franchise Tax Board and conclude, in accordance with its determination, that the amount listed on the partnership return as "income" constituted gross income to the partnership and that the amount listed as "pay-outs" constituted bets lost by the partnership. After May 3, 1951, the effective date of Section 17359 of the Revenue and Taxation Code, the deduction of the bets lost was prohibited (Hetzel v. Franchise Tax Board, 161 Cal. App. 2d 224).

Appellants have raised certain constitutional objections to Section 17359. Some of them have been specifically answered in the case of Hetzel v. Franchise Tax Board (supra). In any event, in accordance with our well established policy, we will not pass upon the constitutionality of a statute in an appeal involving unpaid assessments, since a finding of unconstitutionality could not be reviewed by the courts' (see Appeal of Tide Water Associated Oil Co., decided June 3, 1948; Appeals of Margaret R. and Jules v. Van Cleave, decided May 11, 1955; Appeals of C. B. Hall, Sr., et al., decided December 29, 1958).

### O R D E R

Pursuant to the views expressed in the Opinion of the Board on file in this proceeding, and good cause appearing therefor, .

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to Section 18595 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protests of Joseph Partick Gilio, Virginia Gilio, Thomas R. Sullivan and Madeline Sullivan to proposed assessments of additional

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person&l income tax in the amounts of \$7,902.55 against  
Joseph Patrick Gilio, \$7,902.55 against Virginia Gilio and  
\$7,767.43 against Thomas R. and Madeline Sullivan for the  
year 1951 be and the same is 'hereby sustained,

Done at Sacramento, California, this 16th day of  
December, 1959, by the State Board of Equalization.

Paul R. Leake, Chairman

George R. Reilly, Member

John W. Lynch, Member

Richard Nevins, Member

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ATTEST: Dixwell L. Pierce, Secretary